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COLUMBIA, SOUTH CAROLINA

May 19, 2008

VIA ELECTRONIC FILING

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Public Service Commission of South Carolina
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**Re: Application of Duke Energy Carolinas' for Approval of Decision to
Incur Nuclear Generation Pre-Construction Costs
Docket No. 2007-440-E**

Dear Mr. Terreni:

Enclosed for filing please find Duke Energy Carolinas' Memorandum in
Opposition to the Freedom of Information Act request by Charlotte Business Journal.
By copy of this letter we are serving copies of the same on all counsel of record.

If you have any questions, please have someone on your staff contact me.

Yours truly,

ROBINSON, MCFADDEN & MOORE, P.C.

Frank R. Ellerbe, III

FRE/lla
Enclosure
cc/enc:

Mr. Kodwo Ghartey-Tagoe, VP Legal, State Regulation (via email)
Lawrence B. "Bo" Somers, Associate General Counsel (via email)
Nanette Edwards, Esquire (via email & U.S. Mail)
C. Lessie Hammonds, Esquire (via email & U.S. Mail)
Scott A. Elliot, Esquire (via email & U.S. Mail)
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John M. Bowen, Jr. Esquire (via email & U.S. Mail)
Randall Dong (via email)
Joseph Melchers (via email)

STATE OF SOUTH CAROLINA**BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA****In the Matter of****COVER SHEET****Application of Duke Energy Carolinas, LLC for
Approval of Decision to Incur
Nuclear Generation Pre-Construction Costs****DOCKET
NUMBER: 2007-440-E**

(Please type or print)

Submitted by: Frank R. Ellerbe, III**SC Bar Number:** 1866**Address:** Robinson, McFadden & Moore, P.C.
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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)☐ **Emergency Relief demanded in petition** ☐ **Request for item to be placed on Commission's Agenda expeditiously**☐ **Other:** _____

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)		
<input checked="" type="checkbox"/> Electric	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Letter	<input type="checkbox"/> Request
<input type="checkbox"/> Electric/Gas	<input type="checkbox"/> Agreement	<input checked="" type="checkbox"/> Memorandum	<input type="checkbox"/> Request for Certification
<input type="checkbox"/> Electric/Telecommunications	<input type="checkbox"/> Answer	<input type="checkbox"/> Motion	<input type="checkbox"/> Request for Investigation
<input type="checkbox"/> Electric/Water	<input type="checkbox"/> Appellate Review	<input type="checkbox"/> Objection	<input type="checkbox"/> Resale Agreement
<input type="checkbox"/> Electric/Water/Telecom.	<input type="checkbox"/> Application	<input type="checkbox"/> Petition	<input type="checkbox"/> Resale Amendment
<input type="checkbox"/> Electric/Water/Sewer	<input type="checkbox"/> Brief	<input type="checkbox"/> Petition for Reconsideration	<input type="checkbox"/> Reservation Letter
<input type="checkbox"/> Gas	<input type="checkbox"/> Certificate	<input type="checkbox"/> Petition for Rulemaking	<input type="checkbox"/> Response
<input type="checkbox"/> Railroad	<input type="checkbox"/> Comments	<input type="checkbox"/> Petition for Rule to Show Cause	<input type="checkbox"/> Response to Discovery
<input type="checkbox"/> Sewer	<input type="checkbox"/> Complaint	<input type="checkbox"/> Petition to Intervene	<input type="checkbox"/> Return to Petition
<input type="checkbox"/> Telecommunications	<input type="checkbox"/> Consent Order	<input type="checkbox"/> Petition to Intervene Out of Time	<input type="checkbox"/> Stipulation
<input type="checkbox"/> Transportation	<input type="checkbox"/> Discovery	<input type="checkbox"/> Prefiled Testimony	<input type="checkbox"/> Subpoena
<input type="checkbox"/> Water	<input type="checkbox"/> Exhibit	<input type="checkbox"/> Promotion	<input type="checkbox"/> Tariff
<input type="checkbox"/> Water/Sewer	<input type="checkbox"/> Expedited Consideration	<input type="checkbox"/> Proposed Order	<input type="checkbox"/>
<input type="checkbox"/> Administrative Matter	<input type="checkbox"/> Interconnection Agreement	<input type="checkbox"/> Protest	
<input type="checkbox"/> Other:	<input type="checkbox"/> Interconnection Amendment	<input type="checkbox"/> Publisher's Affidavit	
	<input type="checkbox"/> Late-Filed Exhibit	<input type="checkbox"/> Report	

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

DOCKET NO. 2007-440-E

In Re:)	DUKE ENERGY
)	CAROLINAS'
Application of Duke Energy Carolinas, LLC)	MEMORANDUM IN
For Approval of Decision to Incur Nuclear)	OPPOSITION TO FOIA
Generation Pre-Construction Costs)	DISCLOSURE REQUEST
)	
)	
)	

Duke Energy Carolinas, LLC, ("Duke Energy Carolinas" or the "Company") opposes the Charlotte Business Journal's request pursuant to the South Carolina Freedom of Information Act ("FOIA") to the Public Service Commission of South Carolina ("Commission") for disclosure of information related to cost estimates. The FOIA permits the Commission to maintain the confidentiality of the requested information and the Commission should continue to protect it from disclosure.

I. BACKGROUND

The Charlotte Business Journal seeks copies of Duke Energy Carolinas' cost estimates for the Lee Nuclear Station as provided to the Commission during its hearing on May 12, 2008, and the written record of testimony related to cost estimates provided by Dhiaa M. Jamil during the hearing. The Commission has addressed disclosure of the cost estimate information four times during this proceeding. Each time the Commission correctly ruled that this information can and should be protected from disclosure.

Duke Energy Carolinas Motion for Protective Order

Initially, the Friends of the Earth ("FoE") filed Interrogatories and Requests for Production seeking cost estimates and related data. Certain documents requested were covered by confidentiality agreements with a consortium of potential suppliers led by Westinghouse Electric Company and Stone & Webster ("Westinghouse/Stone") who made a special appearance in the proceeding to object to the production of those documents. Duke Energy Carolinas was willing to produce to counsel for FoE certain documents under a confidentiality agreement, but FoE refused to accept any documents under a confidentiality agreement. As a result, Duke Energy Carolinas sought a protective order from the Commission on the grounds that public disclosure of the cost information would disadvantage the Company in negotiations for the procurement of major equipment to be installed in the Lee Nuclear Station since it would allow equipment suppliers to deduce the Company's own projections of anticipated equipment costs. The motion was supported by the Affidavit of Dhiaa Jamil which set out in detail the reasons why documents containing cost information should be protected. In Order No. 2008-327, the Commission made the finding that certain of the information requested by FoE was "confidential and commercially sensitive in nature, and that [its] disclosure could jeopardize Duke's bargaining in contractual negotiations, possibly driving up the costs of a power plant, and potentially passing increased costs on to consumers." Order No. 2008-327, p. 7.

Directive of Hearing Officer

The second ruling came after a hearing on unresolved discovery issues on May 5, 2008. Hearing Officer B. Randall Dong issued a Directive holding that Duke Energy

Carolinas should be allowed to protect the confidentiality of documents relating to the projected costs of the nuclear facility to the extent that disclosure of such information would adversely affect the company's ability to negotiate the lowest possible total cost. The Directive noted the Commission's broad authority to impose confidentiality orders shielding sensitive information from public disclosure and refused to make the documents available to FoE without a confidentiality order in place, citing Hamm v. S.C. Public Service Commission, 312 S.C. 238, 439 S.E.2d 852 (1994).

May 6, 2008 Hearing

The next ruling by this Commission protecting the confidentiality of the cost information came during the testimony of Janice Hager on behalf of Duke Energy Carolinas on May 6, 2008. In the face of repeated questioning by counsel for FoE, the Commission ruled that no internal analysis of costs that has not been revealed publicly would be subject to disclosure without a confidentiality agreement in place. May 6, 2008, Tr., Vol. 2, p. 167. This Commission took the matter under serious consideration, receiving extended argument on the matter which covering some thirty pages of the transcript of the hearing. The ruling on May 6 was consistent with the previous ruling of the Commission and its Hearing officer: cost information would not be made public while Duke Energy Carolinas was still negotiating towards a contract for the construction of the Lee facility.

May 12, 2008 Hearing

Finally, on May 12, 2008, when Dhiaa M. Jamil was questioned by Commissioner Moseley about the cost of the plant the Commission was again asked to protect the cost information from public disclosure. The Commission again heard argument on the

subject and also independently asked Jamil to explain the importance of protecting the cost information. In that testimony (transcript not yet available), Jamil reiterated and expanded on the matters covered in his affidavit. After hearing his testimony and the argument of counsel, the Commission closed the hearing to the public to prevent disclosure of confidential cost estimates that would harm the company's ability to negotiate the lowest costs for its customers.

II. DISCUSSION

FOIA grants a public body like the Commission the discretion to withhold exempted materials from public disclosure. Campbell v. Marion County Hosp., 354 S.C. 274, 580 S.E.2d 163, 166 (Ct. App. 2003). "Trade secrets" are one of the materials exempt from public disclosure under FOIA. S.C. Code § 30-4-40(a)(1) states that matters may be exempt from FOIA include: "(1) Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes... Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies...and evaluations and other materials which contain references to potential customers, competitive information, or evaluation." When the entire "trade secret" definition is read, it is evident "that the legislature intended the 'trade secret' exemption to protect an organization's studies or preparations in its quest to produce or sell its product or service...." Campbell v. Marion County Hospital, 580 S.E.2d at 169.

The requested information on cost estimates also falls within the definition of a "trade secret" pursuant to the South Carolina Trade Secrets Act. A "trade secret" is defined to include

Information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

S.C. Code § 39-8-20(5). The Lee Nuclear Station cost data is clearly a compilation of information that has actual or potential commercial value. If the Company were to provide an estimate at this stage of the negotiations, an experienced equipment supplier could "reverse engineer" the data to estimate Duke Energy Carolinas' anticipated costs related to the procurement of its equipment. It is reasonable under these circumstances to maintain the confidentiality of this information in order protect the Company's bargaining position.

FOIA also allows the Commission to exempt documents related to proposed contractual arrangements. "[C]onfidential proprietary information provided to a public body for economic development or contract negotiations purposes is not required to be disclosed." S.C. Code § 30-4-40(a)(5)(c). Duke Energy Carolinas is currently engaged in contract negotiations with vendors. To publicly announce a cost estimate at this stage would harm the Company's ability to get the lowest price.

The Commission correctly ruling that the hearing should be closed during the discussion of the cost estimates for the project as allowed by FOIA. The Act specifically provides that a public body can close a meeting to the public when discussing negotiations incident to proposed contractual arrangements. S.C. Code § 30-4-

70(a)(2).¹

The Nuclear Regulatory Commission ("NRC") follows the same approach to protect trade secrets and confidential information that has been applied by the Commission during this proceeding. NRC regulations provide procedures to govern the submission of documents which should be withheld from public disclosure because the documents contain trade secrets, privileged or confidential commercial or financial information. 10 CFR § 2.390(b). Trade secrets and confidential commercial or financial information are exempt from disclosure in final NRC records and documents. 10 CFR § 2.390(a)(4). In determining whether to withhold this information from public disclosure, the NRC considers

- (i) Whether the information has been held in confidence by its owner;
- (ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;
- (iii) Whether the information was transmitted to and received by the Commission in confidence;
- (iv) Whether the information is available in public sources;
- (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

10 CFR §2.390(b)(3). Duke Energy Carolinas has been holding the cost information in confidence and has demonstrated repeatedly throughout the proceedings that public disclosure would cause substantial to its competitive position during the negotiations

¹ This same need to protect confidential information is analogous to protection of the negotiation process when public bodies are attempting to attract business or industry to invest or locate in South Carolina. Under FOIA, the public body is not required to disclose the fiscal impact of offers on the public body until after the offered incentive is accepted and the project has been publicly announced or any incentive agreement has been finalized, whichever occurs later. S.C. Code § 30-4-55.

with vendors which could ultimately increase costs to its customers.

The Supreme Court has upheld the Commission's protection of similar information involving the disclosure of contracts during a semi-annual review of fuel purchasing practices of South Carolina Electric & Gas Co., Inc. ("SCE&G"). Hamm v. S.C. Public Service Com'n, 312 S.C. 238, 439 S.E.2d 852 (Sup. Ct. 1994). The Consumer Advocate requested the production of SCE&G's coal purchasing contracts and coal transportation contracts. SCE&G objected to the production on the ground that publication of the contracts would impair its negotiating position in the future with coal vendors and transportation service providers. SCE&G's motion for a protective order did not seek to prevent the Consumer Advocate from viewing the contracts pursuant to a confidentiality agreement. It only sought to prevent the documents from becoming public. The Commission granted the motion and the Court upheld the ruling. *Hamm v. PSC*, 439 S.E.2d at 853-854. Premature release of the cost estimates being developed by the Company would also place Duke Energy Carolinas at a disadvantage in negotiating with equipment and other suppliers for the procurement of major components of the Lee Nuclear Station.

In the companion case filed by Duke Energy Carolinas in North Carolina for the Lee Nuclear project, the North Carolina Utilities Commission has ruled that the same cost estimate information is confidential and entitled to protection under North Carolina law. N.C. Docket No. E-7, Sub 819. Like the N.C. Utilities Commission, the South Carolina Commission has already correctly ruled several times that allowing public disclosure of cost information at this stage of the process would be detrimental to Duke Energy Carolinas customers' interest. That same reasoning should be applied to deny

the Charlotte Business Journal's FOIA request.

III. CONCLUSION

The Commission should exercise its discretion under FOIA and exempt the cost estimate information requested by the Charlotte Business Journal from public disclosure in order to protect Duke Energy Carolinas' bargaining power so that the Company can negotiate the lowest possible cost for its customers. The Commission has addressed this issue repeatedly in this docket and has compiled a complete and detailed record supporting its decision to protect the confidentiality of the cost information. There has been no reason advanced to vary from that decision.

Dated this 19th day of May, 2008.

ROBINSON, MCFADDEN & MOORE, P.C.



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**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2007-440-E**

In the Matter of

Application of Duke Energy Carolinas, LLC)
for Approval of Decision to Incur Nuclear)
Generation Pre-Construction Costs For the)
Lee Nuclear Station in Cherokee County)

CERTIFICATE OF SERVICE

This is to certify that I, Leslie Allen with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Duke Energy Carolinas, LLC's Memorandum in Opposition to the Freedom of Information Act request by Charlotte Business Journal** in the foregoing matter by causing a copy of same to be placed in the United States Mail, postage prepaid, in an envelope addressed as follows:

Nanette S. Edwards, Esquire
C. Lessie Hammonds, Esquire
Office of Regulatory Staff
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Scott A. Elliott, Esquire
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Elliott & Elliott, PA
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Robert Guild, Esquire
Friends of the Earth
314 Pall Mall
Columbia, SC 29201

Dated at Columbia, South Carolina this 19th day of May, 2008.



Leslie Allen